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Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court of the United States

DANIEL TEPOEL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Daniel TePoel #06413-090
FPC Duluth
PO Box 1000
Duluth, MN 55814

Pro se Petitioner

QUESTIONS PRESENTED

The following questions are presented by the petitioner:

I. May a district court sentence (punish) a defendant in a criminal case for conduct outside the statute of limitations?

II. May a defendant be tried for acts that were never considered by a grand jury?

III. Is the client the master of his own defense?

IV. Is an attorney who has never won an acquittal in over ten (10) years of practice in federal court a "good" attorney?

V. Is *Geboy v. Gray*, 471 F.2d 575 n. 4 (7th Cir. 1973) still controlling precedent in the Seventh Circuit Court of Appeals?

VI. Does Federal Rule of Criminal Procedure 6(b)(1) and (2) have the same meaning as any of the statutes beginning at 28 U.S.C. § 1861 through 28 U.S.C. § 1868?

VII. Does a defendant have the right to challenge the legal qualifications of the grand jurors who voted to indict him?

PARTIES BELOW

Petitioner Daniel TePoel was the Defendant-Appellant in the court below. Respondent United States of America was the Plaintiff-Appellee in the court below.

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v.

UNITED STATES OF AMERICA,
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On Petition For Writ Of Certiorari
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PETITION FOR WRIT OF CERTIORARI

Daniel TePoel, on behalf of himself, hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, filed on March 24, 2009. There was no good-faith determination of the law in petitioner's case in either the district court or the Seventh Circuit Court of Appeals.

OPINIONS BELOW

The unreported Court of Appeals' Opinion affirming the judgment of the district court, entered March 24, 2009, is reproduced at Pet. App 1a-6a. The petition for rehearing and for rehearing en banc, that

was denied on April 27, 2009 is reproduced at Pet. App 7a.

JURISDICTIONAL STATEMENT

The Court of Appeals' final judgment, denial of petition for rehearing and for rehearing en banc, was entered on April 27, 2009. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth and Sixth Amendments to the United States Constitution.

The Fifth Amendment, U.S. Constitution, provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment, U.S. Constitution, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously

ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATUTORY PROVISIONS INVOLVED

This case involves Federal Rule of Criminal Procedure 6(b)(1) and (2)

Federal Rule of Criminal Procedure 6(b) provides:

> **(b) Objection to the Grand Jury or to a Grand Juror.**
>
> **(1) Challenges.** Either the government or a defendant may challenge the grand jury on the ground that it was not lawfully drawn, summoned, or selected, and may challenge an individual juror on the ground that the juror is not legally qualified.
>
> **(2) Motion to Dismiss an Indictment.** A party may move to dismiss the indictment based on an objection to the grand jury or on an individual juror's lack of legal qualification, unless the court has previously ruled on the same objection under Rule 6(b)(1). The motion to dismiss is governed by 28 U.S.C. § 1867(e). The court must not dismiss the indictment on the ground that a grand juror was not legally qualified if the record shows that at least 12 qualified jurors concurred in the indictment.

STATEMENT OF THE CASE

Petitioner Daniel TePoel ("TePoel") had owned and

operated Interstate Mortgage Company in Duluth, Minnesota for several years when Garry Milosevich ("Milosevich") started as an independent mortgage originator in the mid 90s.

A friend of TePoel by the name of Dale Jokela told him about Verlin Swartzendruber AKA, TC ("TC"). In the late part of 1996 Milosevich, Arlen Rasmussen and TePoel went to an Offshore Investment meeting in Minneapolis, Minnesota, that was put on by TC. TePoel personally did not have any funds to invest.

In the spring of 1997, Milosevich told TePoel he had invested with TC and it looked promising. Milosevich started traveling to St. Vincent, West Indies, because that was where TC was living and doing business. Milosevich then quit originating mortgages and sublet an office at Interstate Mortgage Company.

In 1999 Milosevich asked TePoel to go with him to St. Vincent and on to Grenada to look at real estate. TePoel had done some real-estate projects and Milosevich wanted help with this project and offered TePoel a percentage to help him. TePoel went and met with TC who showed them two bank guarantees of over $10 million each at that meeting in 1999.

TePoel helped locate real-estate property in Grenada. Randy Pfingsten and his brother-in-law decided to invest in Cinnamon Hill Resort there. This was backed by Milosevich's own personal investment account with TC of $1,400,000 to develop Cinnamon Hill Resort by which all investors would have benefited.

TePoel spent most of his time on Cinnamon Hill to remodel the property. TePoel had a friend of his go to Grenada to survey the property and work on laying out 400 units on 8 acres of beach frontage. At that time Milosevich lived in Grenada and TePoel

traveled back and forth. TePoel worked with suppliers and his wife Cher worked on furniture, paint, wall coverings, tile, etc. for the existing 21 units.

Milosevich was not in Duluth much anymore and would ask TePoel to relay messages to some of his investors. These investors came from friends of friends. One group was from a friend by the name of Dale Carlson that both Milosevich and TePoel knew. TePoel helped relay information to some of Dale Carlson's friends.

In late 1999 or 2000 Milosevich transferred his accounts from St. Vincent to Grenada and asked TePoel to become a director in case anything happened to him. In such a case, TePoel would take care of his family and his investors, so TePoel did sign as a director.

The money coming into Cinnamon Hill was $250,000 a month from TC—part of it for a monthly payment and the balance for construction and remodeling of the present units.

Around August 2000 Milosevich had $8.5 million in his investment portfolio with TC. When people invested with Milosevich's company, Interstar Management Company, Milosevich would debit his account with TC on his own personal account. Milosevich would credit the personal investing against his $8.5 million. So the funds that came in from investors could be used for other projects and personal use by Milosevich, including a loan to TePoel of approximately $200,000 of which $145,000 was used to purchase real estate. TePoel took out a loan and paid Milosevich back about $80,000 from 2002 to 2006.

Things were moving forward until late 2000 when TC was to start paying Milosevich right before the

closing of Cinnamon Hill—which was to happen in January 2001. The paperwork had been finished and the property was to be in thirds, but at closing TC wanted 51%, and that is when it all went downhill.

After Cinnamon Hill did not close, Milosevich hired an attorney to fight TC. A judgment was placed on TC and after that TC left the island. TePoel was named in the lawsuit but never met with any attorney. TePoel did not stay in Grenada.

Milosevich, TePoel, and the main construction person, Jim Rickert ("Rickert") started working on loans to finish Cinnamon Hill and pay back Milosevich's investors. Rickert had a loan commitment of $5 million and Milosevich had one for $10 million. Just after Milosevich's loan was approved, the 9/11 disaster happened. The bank could not fund the loan after that and Rickert's loan commitment was withdrawn-all lending was down. Milosevich kept trying to get things going to pay off investors.

In 2002 TePoel had little to do with Milosevich's investors. At that point if the investors called TePoel, he gave them Milosevich's phone number and told them to call him.

Then TePoel was indicted for conspiracy, mail fraud, wire fraud, and making a false statement in an agency proceeding on April 25, 2007, for his (unwitting) role in a Ponzi scheme initiated by one Verlin Swartzendruber in which TePoel's co-defendant Garry Milosevich was sucked into and who, in turn, involved TePoel.

TePoel was assigned three public defenders, each of whom was so ineffective and recalcitrant (refusing to file pretrial motions, etc.) that TePoel filed ineffective assistance of counsel motions against them. All of the Motions in Limine requested by the

Government were granted. TePoel was forced to go pro se on March 17, 2009.

Apparently, given the statistics of "the Government always wins," a sacrifice of unarmed prisoners to gladiators[1] is exactly what it has become. This particular "unarmed prisoner" was found guilty of all 8 counts of the indictment on March 27, 2007.

After filing a Notice and Demand to Proceed Pro Se, April 30, 2008, after appointed counsel refused to file a recusal motion against the lower court judge, TePoel filed it himself on May 5, 2008 (TePoel was informed by counsel that the lower court was "livid" when she read the recusal motion). Said motion was denied on June 2, 2007.

The lower court sentenced TePoel to 136 months of incarceration and 3 years of supervised release on June 4, 2008, docket.

REASONS FOR GRANTING THE WRIT

The Writ must be granted because the Seventh Circuit Court of Appeals' decision fails to answer questions that must be raised in the lower court, again and again, until *someone* provides the answers. *I.e.*, the questions posed herein are "capable of repetition, yet evading review."

Those questions are:

I. May a district court sentence (punish) a defendant in a criminal case for conduct outside the statute of limitations?

II. May a defendant be tried for acts that were never considered by a grand jury?

---

[1] *See United States v. Cronic*, 466 U.S. 648, 657, 104 S.Ct. 2039 (1984) (citation omitted).

III. Is the client the master of his own defense?

IV. Is an attorney who has never won an acquittal in over ten (10) years of practice in federal court a "good" attorney?

V. Is *Geboy v. Gray*, 471 F.2d 575 n. 4 (7th Cir. 1973) still controlling in the Seventh Circuit Court of Appeals?

VI. Does Federal Rule of Criminal Procedure 6(b)(1) and (2) have the same meaning as any of the statutes beginning at 28 U.S.C. § 1861 through 28 U.S.C. § 1868?

VII. Does a defendant have the right to challenge the legal qualifications of the grand jurors who voted to indict him?

The Seventh Circuit Court of Appeals decision is also at loggerheads with almost every Grand Jury and indictment case ever authored by this Court and the Rules of Criminal Procedure enacted by Congress.

> TePoel does not argue that the government's evidence was insufficient to convict him or that his sentence is unreasonable. Instead, he contends that along the way the district court made a slew of erroneous rulings. First, he takes issue with the court's denial of two motions to dismiss the indictment, where he argued that dismissal was appropriate because the government would not identify the names of the grand jurors who voted to indict him so that he could challenge their qualifications, and that he was the victim of selective prosecution. We will overturn a district court's refusal to dismiss an indictment only if the court abused its

> discretion. *United States v. Darif*, 446 F.3d 701, 708 (7th Cir. 2006).
>
> Order of March 24, 2009, p. 2.

Apparently, a flagrant denial of Federal Rule of Criminal Procedure 6(b)(1) and (2) motions, in plain defiance of the intent of Congress is not an "abuse of discretion."

> Given that a jury found TePoel guilty beyond a reasonable doubt, it is hard to see how errors in the grand-jury process could matter. *See United States v. Mechanik*, 475 U.S. 66, 70-72 (1986); *see also Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988) (holding that errors or defects in grand-jury procedures can result in dismissal of an indictment only if they are prejudicial).
>
> Order of March 24, 2009, p. 2.

Apparently, errors or defects in the grand jury process are "prejudicial" only if an appellate panel *wants* them to be "prejudicial." Humpty Dumpty explains it best:

> "When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."
>
> "The question is," said Alice, "whether you *can* make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master—that's all."
>
> Lewis Carroll, *The Annotated Alice: Alice's Adventures In Wonderland & Through The Looking Glass*, 269 (Martin Gardner 1960).

Alice-in-Wonderland was a world in which words had no meaning. *Welch v. United States*, 90 S.Ct. 1792, 1803 (1970).

> Nonetheless, TePoel was not entitled to the names or voting records of the grand jurors. Although criminal defendants generally may inspect grand-jury selection records under the Jury Selection and Service Act, 28 U.S.C. §§ 1861-78, they are not normally entitled to know the names or votes of the individual grand jurors who indicted them. *See United States v. Deffenbaugh Indus., Inc.*, 957 F.2d 749, 755-57 (10th Cir. 1992); *United States v. McLernon*, 746 F.2d 1098, 1122-23 (6th Cir. 1984). The strong interest in secrecy accorded the grand-jury process can be overcome only if the defendant demonstrates with particularity that grounds might exist for a motion to dismiss based on materials concerning the grand jury. FED. R. CRIM. P. 6(e)(3)(E)(ii); *see United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 443 (1983); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959); *United States v. Hansel*, 70 F.3d 6, 8 (2d Cir. 1995); *In re Grand Jury 89-4-72*, 932 F.2d 481, 489 (6th Cir. 1991); *United States v. Lang*, 644 F.2d 1232, 1238-39 (7th Cir. 1981); *State of Wisconsin v. Schaffer*, 565 F.2d 961, 965 (7th Cir. 1977). TePoel contends that he wanted this information out of a general concern that the grand jurors who indicted him might not be qualified, but this vague grounds for disclosure does not even come close to making the necessary particularized showing. *See Hansel*, 70 F.3d at 8; *Lang*, 644 F.2d at 1238-39.

Order of March 24, 2009, p. 2.

Note that the deciding panel of the Seventh Circuit Court of Appeals studiously ignores Federal Rule of Criminal Procedure 6(b)(1) and (2) nor do those rules *require* a "particularized showing."

Petitioner was denied the assistance of counsel as well. The Seventh Circuit decision is at loggerheads with the decision of this Court.

> By exercising his constitutional right to the assistance of counsel, a defendant does not relinquish his right to set the parameters of that representation. Any other conclusion would be "to imprison a man in his privileges and call it the Constitution." *Adams*, 317 U.S. at 280, 63 S.Ct. at 242.
>
> *United States v. Teague*, 953 F.2d 1525 (11th Cir. 1992).

Such imprisonment appears to be fully acceptable to the Seventh Circuit Court of Appeals:

> A defendant, through his actions, can constructively waive his right to counsel. *See United States v. Oreye,* 263 F.3d 669, 670 (7th Cir. 2001); *United States v. Harris,* 2 F.3d 1452, 1455 (7th Cir. 1993). A defendant makes a knowing and voluntary decision to forgo counsel if his conduct after the district court has given him a lawyer has "the effect of depriving himself of appointed counsel." *United States v. Fazzini,* 871 F.2d 635, 642 (7th Cir. 1989); *see also Harris,* 2 F.3d at 1454-55. TePoel was unwilling to cooperate with any of the four lawyers appointed for him during the course of his trial and sentencing despite the magistrate judge's warnings that failure to do so would compel

> TePoel to proceed pro se. TePoel's conduct in the face of the magistrate judge's admonitions demonstrates that he waived his right to counsel. *See United States v. Irorere,* 228 F.3d 816, 828 (7th Cir. 2000); *Harris,* 2 F.3d at 1455.
>
> Order of March 24, 2009, p. 3.

The Seventh Circuit Court of Appeals also ignores petitioner's issue regarding the constructive amendment of the indictment against him.

> TePoel also argues that the district court's application of the sentencing guidelines violated the statute of limitations. As we understand his argument, he contends that at sentencing the district court should not have considered some of his victims' losses as "relevant conduct," *see* U.S.S.G. § 181.3, insisting that the conduct leading to these losses occurred outside the statute of limitations and, because he could not be prosecuted for it, he should not be punished for it. TePoel did not raise a statute-of-limitations objection in the district court; thus, our review is for plain error. *See United States v. Farmer,* 543 F.3d 363, 372 (7th Cir. 2008); *United States v. Ross,* 77 F.3d 1525, 1536 (7th Cir. 1996). But this argument is a non-starter because there is no statute-of-limitations problem here. The conspiracy lasted from 1997 until 2007, and because there was an overt act within five years before the indictment, all of TePoel's activities in furtherance of the criminal enterprise are part of the conspiracy, no matter when the criminal conduct started. *United States v. Useni,* 516 F.3d 634, 655-56 (7th Cir. 2008); *United States v. Yashar,* 166 F.3d 873,

> 875-76 (7th Cir. 1999). Moreover, we already have determined that the statute of limitations does not restrict what the district court may consider as relevant conduct during sentencing. *See United States v. Valenti,* 121 F.3d 327, 334 (7th Cir. 1997); *see also* U.S.S.G § 1B1.3 cmt. n. 1 (explaining that the "principles and limits of sentencing accountability under" the relevant conduct guideline "are not always the same as the principles and limits of criminal liability").
>
> Order of March 24, 2009, p. 4.

The Seventh Circuit Court of Appeals sidesteps the fact that the indictment was constructively amended for conduct—outside the statute of limitations—that was never *considered* by the grand jury.

A page from Petitioner's Opening Appeal Brief bears repeating:

The lower court included the amounts lost by witnesses Anderson and Pfingsten.

The problem with the lower court's use of these amounts is as follows:

Start with the base amount of:	$2,765,000
Deduct the amount the Government admits:	($ 170,000)
Deduct the amount Randy Pfingsten admits he parted with in1999:	($1,700,000)
Deduct the amount William Anderson admits he parted with in 1999 (at least):	($ 200,000)

Do the calculations.

The total losses outside the statute of limitations (at least):	$ 2,070,000
Using the above calculations results in the amount chargeable to Petitioner within the statute of Limitations (not counting others in indictment):	$ 695,000

There are other problems as well.

Note that there are *no amounts* (NONE) listed on the indictment itself.

Note also that *all* the accusations of mail fraud could only refer to "lulling letters" (the indictment is so poorly drafted that it is impossible to tell), as opposed to an actual transfer of money.

Note also that Randy Pfingsten never testified to the Grand Jury, though he had asked to be able to do so. When he did testify at trial, he:

> (1) asked that the amount not be divulged to the jury.
>
> (2) testified that he *and his brother-in-law* (who did not testify) invested $1.7 million in May of 1999. March 26, 2008 2:00 pm transcript, pp. 3-B-14 to 19.

There are two quotes from the lower courts that *this* Court should consider before denying *certiorari*:

> [U]ltimately, the guarantee of [our] rights is no stronger than the integrity and fairness of the judge to whom the trial is entrusted.
>
> *Bracy v. Gramley*, 81 F.3d 684, 703 (7th Cir. 1996) (dissent), *reversed*, 520 U. S. 899, 117 S.Ct. 1793 (1997).

> What we have here is what I have referred to as the Russianizing of our Constitution. The language is quite clear, but we can, by sophistry or otherwise treat it and ignore it and that's what happened in other countries. I don't want to see it happen here.
>
> *United States v. Galloway*, 943 F.2d 897, 899 (8th Cir. 1991) (quoting Sent. Tr. at 28-29).
>
> *United States v. Galloway*, 976 F.2d 414 (8th Cir. 1992).

Petitioner submits that it has *already* happened here. Only this Court can reverse it.

CONCLUSION

Petitioner's questions, while several in number, can be boiled down to one for this Court: Will this Court allow the continued Russianizing of our Constitution?

Yes?

Or no?

For the reason set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Daniel TePoel #06413-090
FPC Duluth
PO Box 1000
Duluth, MN 55814
Pro se Petitioner

Dated: June _____, 2009

APPENDIX

APPENDIX A

NONPRECEDENTIAL DISPOSTION
To be cited only in accordance with
Fed. R. App. P. 32.1

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Submitted March 11, 2009*
Decided March 24, 2009

Before

MICHAEL S. KANNE, *Circuit Judge*
DIANE P. WOOD, *Circuit Judge*
DIANE S. SYKES, *Circuit Judge*

No. 08-2477

Appeal from the United States District Court for the Western District of Wisconsin

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

No. 07-CR-66-bbc-01

Daniel TePoel,
Defendant-Appellant.

Barbara B. Crabb,
Chief Judge.

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* After examining the briefs and the record, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the briefs and the record. *See* FED. R. APP. P. 34(a)(2).

Daniel TePoel defrauded investors of over $2.5 million by telling them he would invest their money in high-yield, low-risk bank instruments, when in fact he was spending the money on personal expenses and a failed real-estate venture. A federal jury found TePoel guilty of four counts of mail fraud, *see* 18 U.S.C. § 1341, two counts of wire fraud, *see id.* § 1343, one count of conspiracy to commit mail and wire fraud, *see id.* §§ 1349, 1341, 1343, and one count of making false statements to an FBI agent, *see id.* § 1001. The district court sentenced TePoel to a total of 136 months' imprisonment, which was in the middle of the guidelines range. We have allowed TePoel to pursue his appeal pro se, and we affirm the district court's judgment.

TePoel does not argue that the government's evidence was insufficient to convict him or that his sentence is unreasonable. Instead, he contends that along the way the district court made a slew of erroneous rulings. First, he takes issue with the court's denial of two motions to dismiss the indictment, where he argued that dismissal was appropriate because the government would not identify the names of the grand jurors who voted to indict him so that he could challenge their qualifications, and that he was the victim of selective prosecution. We will overturn a district court's refusal to dismiss an indictment only if the court abused its discretion. *United States v. Darif*, 446 F.3d 701, 708 (7th Cir. 2006).

Given that a jury found TePoel guilty beyond a reasonable doubt, it is hard to see how errors in the grand-jury process could matter. *See United States v. Mechanik*, 475 U.S. 66, 70-72 (1986); *see also Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988) (holding that errors or defects in grand-jury procedures can result in dismissal of an indictment only if they are prejudicial). Nonetheless, TePoel

was not entitled to the names or voting records of the grand jurors. Although criminal defendants generally may inspect grand-jury selection records under the Jury Selection and Service Act, 28 U.S.C. §§ 1861-78, they are not normally entitled to know the names or votes of the individual grand jurors who indicted them. *See United States v. Deffenbaugh Indus., Inc.*, 957 F.2d 749, 755-57 (10th Cir. 1992); *United States v. McLernon*, 746 F.2d 1098, 1122-23 (6th Cir. 1984). The strong interest in secrecy accorded the grand-jury process can be overcome only if the defendant demonstrates with particularity that grounds might exist for a motion to dismiss based on materials concerning the grand jury. FED. R. CRIM. P. 6(e)(3)(E)(ii); *see United States v. Sells Eng.g, Inc.*, 463 U.S. 418, 443 (1983); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959); *United States v. Hansel*, 70 F.3d 6, 8 (2d Cir. 1995); *In re Grand Jury 89-4-72*, 932 F.2d 481, 489 (6th Cir. 1991); *United States v. Lang*, 644 F.2d 1232, 1238-39 (7th Cir. 1981); *State of Wisconsin v. Schaffer*, 565 F.2d 961, 965 (7th Cir. 1977). TePoel contends that he wanted this information out of a general concern that the grand jurors who indicted him might not be qualified, but this vague grounds for disclosure does not even come close to making the necessary particularized showing. *See Hansel*, 70 F.3d at 8; *Lang*, 644 F.2d at 1238-39.

Next, TePoel argues that he was selectively prosecuted because of an "abuse of the grand jury process." A selective-prosecution challenge can be successful only if the defendant establishes that the decision to prosecute him was made on the basis of an invidious ground such as race, religion, or the exercise of constitutional rights. *See United States v. Moore*, 543 F.3d 891, 899-900 (7th Cir. 2008); *Darif*, 446 F.3d at 708. TePoel did not even hint that any of

these factors influenced his prosecution, so his motion to dismiss on that ground was frivolous.

TePoel also contends that he was denied his constitutional right to assistance of counsel. Over the course of the pretrial proceedings, a magistrate judge appointed TePoel three attorneys. The magistrate judge urged TePoel to cooperate with each of his attorneys and advised TePoel that he was not entitled to an unlimited supply of lawyers. The magistrate judge further warned TePoel that he would end up representing himself at trial if he could not get along with his counsel. Nevertheless, each relationship eventually broke down, and the magistrate judge allowed each attorney to withdraw. When the third attorney withdrew—less than two weeks before trial, which had been continued for a year while each successive lawyer got up to speed—the magistrate judge concluded that TePoel had constructively waived his right to counsel and so declined to appoint another. Nevertheless, the court later appointed a fourth attorney to act as standby counsel at trial, where TePoel represented himself pro se. Once TePoel was convicted, he requested that the court appoint the attorney who acted as standby counsel at trial to represent him at sentencing. The court obliged, but later allowed that lawyer to withdraw when TePoel became dissatisfied with her performance. TePoel once again represented himself at sentencing.

A defendant, through his actions, can constructively waive his right to counsel. *See United States v. Oreye*, 263 F.3d 669, 670 (7th Cir. 2001); *United States v. Harris*, 2 F.3d 1452, 1455 (7th Cir. 1993). A defendant makes a knowing and voluntary decision to forgo counsel if his conduct after the district court has given him a lawyer has "the effect of depriving himself of appointed counsel." *United States v. Fazzini*, 871 F.2d 635, 642 (7th Cir. 1989);

see also Harris, 2 F.3d at 1454-55. TePoel was unwilling to cooperate with any of the four lawyers appointed for him during the course of his trial and sentencing despite the magistrate judge's warnings that failure to do so would compel TePoel to proceed pro se. TePoel's conduct in the face of the magistrate judge's admonitions demonstrates that he waived his right to counsel. *See United States v. Irorere*, 228 F.3d 816, 828 (7th Cir. 2000); *Harris*, 2 F.3d at 1455.

TePoel next contends that the district court abused its discretion in denying his recusal motion. Before sentencing, TePoel asked the judge to recuse herself, *see* 28 U.S.C. § 144, asserting that she was prejudiced against him. As evidence of this, TePoel pointed out in an affidavit that the judge sustained most of the government's objections during trial, refused to let him introduce irrelevant evidence, and remanded him to jail after the guilty verdicts. But § 144 requires the party requesting recusal to show actual bias—i.e., personal animus or malice—on the part of the judge, *see Tezak v. United States*, 256 F.3d 702, 718 (7th Cir. 2001), and none of TePoel's assertions came close to meeting this threshhold, *see United States v. Morgan*, 384 F.3d 439, 444 (7th Cir. 2004) (noting that a judge's adverse evidentiary rulings do not establish bias); *Golant v. Levy (In re Golant)*, 239 F.3d 931, 938 (7th Cir. 2001) (explaining that loss on the merits or disagreement with judge's rulings are not evidence of bias); *see also Liteky v. United States*, 510 U.S. 540, 555 (1994) (noting that "judicial rulings alone almost never constitute a valid basis" for a recusal motion). Thus, there was no reason for the judge to recuse herself.

TePoel also argues that the district court's application of the sentencing guidelines violated the statute of limitations. As we understand his argument, he contends that at sentencing the district court should not have considered some of his victims'

losses as "relevant conduct," *see* U.S.S.G. § 1B1.3, insisting that the conduct leading to these losses occurred outside the statute of limitations and, because he could not be prosecuted for it, he should not be punished for it. TePoel did not raise a statute-of-limitations objection in the district court; thus, our review is for plain error. *See United States v. Farmer*, 543 F.3d 363, 372 (7th Cir. 2008); *United States v. Ross*, 77 F.3d 1525, 1536 (7th Cir. 1996). But this argument is a non-starter because there is no statute-of-limitations problem here. The conspiracy lasted from 1997 until 2007, and because there was an overt act within five years before the indictment, all of TePoel's activities in furtherance of the criminal enterprise are part of the conspiracy, no matter when the criminal conduct started. *United States v. Useni*, 516 F.3d 634, 655-56 (7th Cir. 2008); *United States v. Yashar*, 166 F.3d 873, 875-76 (7th Cir. 1999). Moreover, we already have determined that the statute of limitations does not restrict what the district court may consider as relevant conduct during sentencing. *See United States v. Valenti*, 121 F.3d 327, 334 (7th Cir. 1997); *see also* U.S.S.G § 1B1.3 cmt. n.1 (explaining that the "principles and limits of sentencing accountability under" the relevant-conduct guideline "are not always the same as the principles and limits of criminal liability").

Finally, we have considered TePoel's remaining arguments and conclude that each is either undeveloped or meritless.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

April 27, 2009

Before

MICHAEL S. KANNE, *Circuit Judge*
DIANE P. WOOD, *Circuit Judge*
DIANE S. SYKES, *Circuit Judge*

No. 08-2477

Appeal from the United States District Court for the Western District of Wisconsin

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

No. 07 CR 66

Daniel TePoel,
Defendant-Appellant.

Barbara B. Crabb,
Chief Judge.

ORDER

On consideration of the petition for rehearing and for rehearing en banc, no judge in active service has requested a vote on the petition for rehearing en banc and all of the judges on the original panel have voted to deny rehearing. It is therefore ordered that the petition for rehearing and for rehearing en banc is DENIED.